No. 93-1535

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION and
MON VALLEY ENERGY CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

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1. As previously discussed by petitioners, *see* Pet. at 5, 19-20, this case is closely related to the Petition now pending before this Court styled *West Penn Power Company, et al.* v. *Pennsylvania Public Utility Commission, et al.*, No. 93-1341 (filed Feb. 22, 1994). By Order dated May 23, 1994, this Court has invited the Solicitor General to file a brief in No. 93-1341 expressing the views of the United States. Because the Federal Energy Regulatory Commission ("FERC") has had no opportunity to participate in the proceedings below, and because that federal agency has special expertise concerning the questions presented in this Petition arising under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3, petitioners suggest that the Court also invite the Solicitor General to express the views of the

United States in this case. That this case does present significant questions of national importance to the electric utility industry, involving the proper interpretation of PURPA and FERC's implementing regulations, is evidenced by the briefs already filed in support of the Petition by amici curiae, including other Pennsylvania utilities and the Edison Electric Institute.

2. The Court should be aware that on April 4, 1994, the Pennsylvania Supreme Court denied discretionary review in a third case involving the PURPA obligations of petitioner West Penn Power Company to the developer of a qualifying facility. *See Armco Advanced Materials Corp.* v. *Pennsylvania Public Utility Comm'n,* 157 Pa. Commw. Ct. 150, 629 A.2d 221 (1993), *app. denied,* —— Pa. ——, —— A.2d —— (1994). This third case involves the so-called "Burgettstown" project, in which the Public Utility Commission ("PUC") has now issued a final rate order,[1] based on calculations of avoided cost prepared as of the utility's contract execution date with the developer, rather than the subsequent date of a PUC order requiring the utility to modify a contract that otherwise would have lapsed by its own terms. In the Burgettstown case, the Commonwealth Court reiterated its previous holdings in decisions involving the Milesburg and Shannopin projects, now before this Court, and held that for avoided cost purposes, "time was frozen when the [contract] became effective, and all calculations had to be made as of that date." 629 A.2d at 226. Petitioners anticipate filing a Petition for Certiorari in the Burgettstown case on or before July 5, 1994, and the Court may wish to have all three fully-briefed Petitions before it for consideration prior to ruling on any of the Petitions.

3. Both respondents in this case accuse petitioners of taking inconsistent positions in this litigation on the point

[1] The Burgettstown case thus does not present the "finality" concerns raised by respondent Mon Valley Energy Corp., which are addressed in paragraph 5 below.

at which a "legally enforceable obligation" accrues. *See* Mon Valley Opp. at 23-25; PUC Opp. at 6, 27. For instance, Mon Valley asserts that petitioners Armco and Allegheny argued in 1989 that avoided costs should be calculated at the time West Penn and Mon Valley executed their Agreement, but that petitioners now argue that avoided costs should be calculated as of the date of the PUC's order directing modification of that Agreement.

Respondents' accusations reflect a fundamental misconception of the issues raised by the Petition, and the course of the litigation in this case. In 1989, petitioners did not argue that West Penn's avoided costs should be calculated as of the date of the PUC's modification order *because the PUC had not yet issued the order in question.* It was not until April 27, 1990, that a PUC Commissioner issued an Emergency Order—ratified by the PUC on May 10, 1990—which modified the parties' Agreement, over West Penn's objections, by staying the good faith deposit dates and the automatic termination provisions of the Agreement. App. Q, at 310a. This "stay" became a permanent modification in a PUC order entered on January 14, 1992. App. T.

The PUC's modification orders obliterated the contractual protection West Penn had obtained for itself and its customers when West Penn and Mon Valley freely negotiated a contract including milestone dates. By unilaterally excusing Mon Valley's obligation to meet those milestones, the PUC vitiated the private, *contractually based* "legally enforceable obligation" that the parties had negotiated, and instead created a new, commission-imposed legally enforceable obligation accruing as of the date of the modification order. Immediately after the PUC's stay, West Penn attempted to introduce evidence before the PUC of its then-current avoided cost. *See* App. R. Prior to May 10, 1990, petitioners had no reason to introduce such evidence because they believed that the Agreement was a legally enforceable obligation which could not be modified by the PUC to relieve the QF of its contractual

obligations. After the PUC issued a stay, and subsequently a permanent modification of the parties' contract, petitioners have consistently argued that, under § 210 of PURPA and § 292.304(d) of the FERC rules, avoided costs could no longer be calculated as of the date of the original contract's execution. The Pennsylvania PUC and reviewing courts have consistently rejected that argument.

4. Respondent PUC asserts that petitioners are insisting that a State commission has *no* authority to modify a privately negotiated agreement between a utility and a QF. *E.g.*, PUC Opp. at 25. In fact, the question presented is whether, as the Pennsylvania courts have held, PURPA grants State commissions "broad powers" to modify such agreements, without regard to a utility's objections. With respect to that question, petitioners do argue that the PUC may *not* modify a private contract in a manner that would be inconsistent with the federal mandates imposed by PURPA § 210 and the FERC rules.

Respondents apparently do not understand that the two questions presented in the Petition are not separable; rather, the two questions challenge interrelated PUC actions which, taken together, clearly violate PURPA. The PUC: (1) modified a privately negotiated agreement by extending milestone dates which, if enforced, would have voided the contract; and (2) ordered that, notwithstanding that significant contract modification, the "legally enforceable obligation" defined by the FERC rules accrued at the time of contract execution. The result is that the utility's avoided costs were permanently fixed as of the original contract execution date, defeating the utility's expectation that its customers would be protected, at least to some extent, from future downturns in avoided costs by the contractual milestone dates. This Petition challenges both of the PUC's actions, first by questioning whether State commissions have broad discretion under PURPA to modify freely negotiated contracts, notwithstanding a party's objections, and second by questioning whether State commissions, in modifying freely negotiated contracts, are required by PURPA to utilize avoided costs

as of the date of the modifications, in order to protect the utility's customers.

Petitioners assert that, under PURPA's mandates of fairness to consumers, *one* of those questions must be answered in their favor.[2] If this Court rules that State commissions may not modify freely negotiated contracts, over a party's objections, then the Court will establish that PURPA intended to protect consumers through free market principles, including arm's length bargaining, illustrated in this case by West Penn's insistence on milestone dates in the Agreement. If, on the other hand, the Court agrees with the PUC and Commonwealth Court that State commissions have "broad" power under PURPA to modify privately negotiated agreements, then the Court must rule that a commission may only exercise that power consistent with PURPA, including the provisions of § 210 mandating fairness to consumers through utilization of avoided costs as of the date of the modification. In this case, the PUC's combined acts of vitiating the milestone dates, while stubbornly adhering to its determination of the utility's avoided cost calculations as of the original contract execution date, are patently unfair to West Penn's customers.

5. Respondent Mon Valley argues, as it did in its Opposition to the Milesburg Petition, No. 93-1341, that the decision below is not an appealable final judgment, because petitioners' "argument that excessive rates will result . . . is still subject to dispute before the PUC." Mon Valley Opp. at 22. Predictably, respondent PUC does not

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[2] The relief obtained by petitioners will be the same if either question ultimately is answered in their favor. If the PUC has no authority under PURPA to relieve a QF of the burden of a freely negotiated milestone date, then the Agreement and its corresponding "legally enforceable obligation" of October 15, 1987, are void, and any new obligation would accrue as of the date of the modification order. If the PUC does have authority under PURPA to modify a private agreement, then that modification must be construed as creating a new legally enforceable obligation, and avoided costs must be calculated as of the date of that order.

make this argument, just as it failed to make a finality argument in No. 93-1341. Unlike Mon Valley, the PUC candidly recognizes that the outcome of the rate proceeding in this case is preordained with respect to the federal issues presented by this Petition. The PUC has no intention of considering West Penn's avoided costs with respect to the Shannopin project at any time other than October 15, 1987. In fact, the PUC has refused *even to accept evidence* on that issue. Furthermore, in the related case involving the purchase agreement between West Penn and the developers of the Burgettstown project, which also was executed on October 15, 1987, the Pennsylvania PUC and the Commonwealth Court have ruled that "time was frozen when the [contract] became effective, and all calculations had to be made as of that date." *Armco Advanced Materials Corp.* v. *Pennsylvania Public Utility Comm'n, supra*, 157 Pa. Commw. Ct. 150, 629 A.2d 221, 226 (1993).

The rate proceeding now pending before the PUC in this case is merely intended to determine the appropriate capacity payments to be made to Mon Valley, calculated as of October 15, 1987, in light of a later in-service date than the parties originally anticipated. *See* App. Y. That calculation does not affect West Penn's argument that PURPA requires consideration of its avoided costs at a date subsequent to October 15, 1987. Accordingly, as petitioners previously have explained, there is no doubt under *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299 (1989), and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), that the judgment of the Commonwealth Court is final within the meaning of 28 U.S.C. § 1257. *See* Pet. at 17-18, n.9.

6. Mon Valley argues that linking the accrual of a legally enforceable obligation to the date of a commission order to purchase power would create an "unworkable" standard that might require "minute-by-minute" calculations of avoided costs. Mon Valley Opp. at 25-27. Mon Valley once again mischaracterizes petitioners' argument.

Petitioners contend that State commissions *should* honor privately negotiated contracts if the rates they set are just and reasonable; that is the essence of the first question presented. So long as those contracts are honored, the legally enforceable obligation will accrue as of the date of contract execution. It is fair to the utility's customers to fix the avoided cost calculation as of that date because the utility had an opportunity to negotiate for protection against falling avoided costs—for instance, by the inclusion of milestone completion dates. Thus, no need for recalculation would arise unless a State commission later modified the QF's obligations under the contract, thereby removing privately negotiated protections against changing avoided costs.

If, on the other hand, the parties do not reach a privately negotiated contract, or if the State commission modifies a privately negotiated contract, then the legally enforceable obligation accrues as of the date of the PUC's order to purchase, or the order of contract modification. Thus, petitioners have suggested only two alternative dates for the accrual of the legally enforceable obligation defined by the FERC rules. Far from being "unworkable," petitioners' interpretation of PURPA would provide a measure of stability to the legally enforceable obligation determination, because utilities and QFs both will have incentives to enter binding and enforceable long term contracts. *See American Paper Institute* v. *American Elec. Power Serv. Corp.*, 461 U.S. 402, 416 (1983).

7. Both Mon Valley and the PUC accuse petitioners of taking "extraordinary liberties with the facts" and of outright misrepresentation of the record in this case. *E.g.*, Mon Valley Opp. at 2, 3; PUC Opp. at 18. After ignoring similar unsupported attacks in these same respondents' Oppositions to the Milesburg Petition, petitioners are now constrained to point out that it is the respondents who appear unable to state fairly and succinctly the facts and issues presented by this case. For instance, respondents repeatedly state that in 1987 "West Penn had acknowledged a need for 900 MW of coal-fired capacity." Mon

Valley Opp. at 10 n.6; *see id.* at 4, 5. The record below is clear, however, that when this agreement was negotiated the *Allegheny Power System*, of which West Penn is only a part, had a planning need for 900 MW of capacity. *See* App. H, at 148a, 150a; App. I at 234a-235a.

Respondent PUC makes the extraordinary assertion that "[i]n this case there is no holding that the PUC has substantial authority to modify contracts." PUC Opp. at 22. In fact, that precise holding permeates this case. *E.g.*, App. C, at 16a-19a (decision of Commonwealth Court); App. Q, at 304a (PUC's stay order); App. S, at 346a (ALJ's recommended decision); App. T, at 384a-391a (PUC's modification order). The PUC also makes the remarkable claim that "this case does not involve rates." PUC Opp. at 25. If true, that would be surprising news to petitioners Armco and Allegheny, whose only interest in the outcome of these proceedings is the effect it will have on the rates they will be required to pay for West Penn's electricity. Indeed, this case began when West Penn petitioned for approval to pass through to customers, in the form of rates, the charges to be paid under the Shannopin Agreement, App. E, at 84a, and the *amount* of those charges underlies every ruling in this case.

Finally, the PUC has the unmitigated nerve to inform this Court that "[t]here is certainly no fact of record indicating that West Penn had no future need for the MW of capacity on [January 14, 1992]." PUC Opp. at 28. The reason why there is no such fact "of record" is because the PUC itself affirmed its ALJ's decision *to strike from the record West Penn's proffered testimony showing that as of 1990 it had no need for the Shannopin base load capacity*. *See* App. T, at 393a; Pet. at 11, n.6 (describing evidence struck by ALJ). The second question presented in this Petition is premised, at least in part, on the legal propriety of that evidentiary ruling. *See also* Brief of Amicus Curiae Edison Electric Institute, at 9-12.

CONCLUSION

Petitioners respectfully urge this Court to invite the Solicitor General to file a brief setting forth the views of the United States on the questions presented by this Petition. This Petition should be held pending consideration of the Petition in No. 93-1341, and the Petition in the yet to be filed Burgettstown proceedings. All three Petitions should be granted, and consolidated for plenary review.

Respectfully submitted,

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